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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MEEKO SHA CARRAWAY, Defendant and Appellant.	E042514 (Super.Ct.No. FVI12086) OPINION

APPEAL from the Superior Court of San Bernardino County. Eric M. Nakata, Judge. Affirmed.

Wallin & Klarich and Robert C. Kasenow II, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Susan Miller, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Meeko Sha Carraway appeals from his conviction of first degree murder (Pen. Code,[1] § 187, subd. (a)). Defendant contends the trial court erred in (1) denying his motion to represent himself under *Faretta v. California* (1975) 422 U.S. 806, 835 (*Faretta*), (2) admitting into evidence his statements to his wife because those statements were subject to the spousal communication privilege, and (3) admitting into evidence his statements to police regarding the location of the victim's body because those statements were the product of coercion. We find no prejudicial error, and we affirm.

II. FACTS AND PROCEDURAL BACKGROUND

A. The Prosecution's Case

In 1999 defendant lived in Pinon Hills with his wife Jeanette, mother Shirley, and son. On Friday, October 22, 1999, they all went to San Bernardino to spend the weekend with defendant's sister, Christie Jackson. On Sunday, October 24, defendant left Jackson's house in Shirley's car. That evening, defendant purchased $60 worth of methamphetamine and asked one of the sellers if she knew someone who would have sex with him in exchange for methamphetamine. The woman brought him to a house, and Brenda Richardson came out and got in his car.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

Richardson's friend, Tara Crowell, asked Richardson what she was doing. Richardson assured Crowell she was just going to "kick it" and that she would be back. Defendant gave Crowell his home and cellular telephone numbers and Jackson's home telephone number, and Crowell wrote down defendant's license plate number. Crowell reminded Richardson that she (Richardson) needed to be home in the morning because her child had to be taken to school.

Defendant drove Richardson to the home of her friend, and they smoked methamphetamine and had sex in the friend's garage. Richardson then agreed to go with defendant to his house in Pinon Hills. Defendant first took Richardson to her home so she could change her clothes and collect some toiletries.

On Monday, October 25, 1999, Jeanette asked George Keach, defendant's friend, to give her a ride from Jackson's house to Pinon Hills. Keach and Jeanette arrived at the Pinon Hills home sometime in the mid-afternoon. The front door was locked, and no one answered when Jeanette knocked. Jeanette went to the side of the house, where she heard the sound of a television through the bedroom window. She pounded on the bedroom window, and defendant came to the front door.

Jeanette needed to use the bathroom, and she "brushed past" defendant when he opened the door. She noticed the bathroom had been "immaculately cleaned," and the smell of bleach was so strong it made her eyes burn. Jeanette stated this was unusual, because defendant "hardly ever" cleaned. While in the bathroom, Jeanette heard defendant speaking with Keach in whispered tones, just outside the front of the house.

She climbed onto the edge of the bathtub to hear better. She could not hear what Keach was saying, but she heard defendant repeatedly say he "killed her" and that he "knew for a fact that she was dead."

Keach testified that he and defendant had had a conversation outside, and defendant told Keach that he (defendant) had picked up a woman, brought her to the house, and had sex with her. Defendant said he had an argument with the woman because she wanted to leave. Defendant told Keach he had dropped the woman off near the freeway. Keach testified that defendant never said he had harmed or killed the woman.

Jeanette testified that after Keach left, she noticed scratch marks on defendant's face. Defendant told her he had picked up a man to get high with, they had gotten into an argument and had fought briefly, and the man had scratched defendant's face. Jeanette did not believe defendant and continued to press him about what actually happened. Jeanette testified that defendant became "very paranoid," and said he "felt that the police were already watching." Jeanette questioned why the police would be watching him if he had only gotten into an altercation with a drug addict, and defendant kept saying, "[h]er children aren't going to let it go."

Defendant eventually told Jeanette he had picked up a woman and brought her to the house, where they had gotten high and had sex. The woman had begun talking about how she "didn't want to live her life like this anymore," and that she wanted to straighten her life out, stop doing drugs, get back into church, and raise her children properly.

Defendant said he had "snapped" and choked the woman to death. Defendant told Jeanette that he removed the woman's clothing, placed her body into a bathtub full of water, and stepped on her neck to "make sure it was broken and that she was dead." He then cut off her head with a kitchen knife and wire cutters.

Defendant told Jeanette he had put the woman's head into a plastic bag, which he wrapped in her sweater. He wrapped the body in blankets and tied the ends with ace bandages. He dumped the body in the desert beneath a fallen Joshua tree, and he threw the head into the California aqueduct.[2]

On Wednesday, October 27, 1999, Jeanette disposed of a stained bathroom rug in a shopping center dumpster after defendant told her he believed the stains were the woman's blood. Jeanette later discarded the shoes defendant had worn when he dumped the body, after defendant said they would need to get rid of them. Jeanette also purchased stain remover and attempted to clean bloodstains from the back seat of Shirley's car. Defendant told Jeanette the stains were from the woman's head dripping on the seat.

On Saturday, October 30, 1999, Jackson told Jeanette that Richardson's family had been calling to ask about Richardson. Jeanette told Jackson that defendant had killed and decapitated Richardson. Jackson called the police, and Jeanette and defendant were taken to the sheriff's station for questioning. After initially lying to the detectives,

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[2] In 2005, a human lower mandible was recovered when it snagged on a fisherman's line in the aqueduct. The parties stipulated that DNA testing had confirmed the mandible had come from Richardson.

Jeanette eventually revealed that defendant had killed Richardson. Jeanette drew a map of the area where she believed defendant had left Richardson's body.

Defendant told the detectives he had taken Richardson to his home on October 24, and they had had sex. Defendant said he had started to take her home, but his car was running out of gas so he dropped her by the side of the road so she could hitchhike home in time to take her children to school. During a cigarette break in the interview, a detective showed defendant a map based on the map Jeanette had provided and asked defendant to confirm the location of the body. Defendant took a deep breath and drew an "X" on the map to denote the location of the body and an "S" shape to indicate that the road near the body had several curves. Defendant denied, however, that he had killed Richardson. Richardson's body, wrapped in two blankets, was found beneath a fallen Joshua tree in the same area defendant had indicated on the map.

Blood consistent with Richardson's blood was found in the back seat of Shirley's car and on the shower curtain, window sill, and base of the sink cabinet in defendant's bathroom. Defendant's blood was found on the blanket and the Ace bandage that had been used to wrap Richardson's body. Defendant had cuts on both index fingers.

B. The Defense's Case

Defendant testified that he and Richardson had used drugs and had sex at his house. When Jeanette and Keach arrived at the house, defendant and Richardson had been having sex and watching a pornographic movie. Jeanette knocked on the window, and Richardson jumped up and said she would be in the shower. Defendant opened the

front door, and Jeanette "breezed right past" him. Defendant was upset that Keach had brought Jeanette to the house, and defendant went outside to talk to him. Defendant heard screams, and when he went into the bathroom, he saw Jeanette stabbing Richardson in the face and neck area with a butcher knife. Richardson was bleeding profusely and was having trouble breathing; she died within 30 seconds to a minute and a half.

Defendant stated that he went outside to discuss with Keach what to do. They drank beer together, and Keach said defendant could either call the police and "snitch [Jeanette] out" or bury the body himself. Keach suggested defendant cut off Richardson's head, feet, and hands so that no one could identify the body. Defendant cut off Richardson's head with a saw and wire cutters, but when he cut his own fingers in the process, he decided not to remove her feet and hands. Defendant wrapped the body in blankets and wrapped the head in plastic bags and Richardson's sweater. Defendant disposed of the body near a Joshua tree and threw the head into the aqueduct. Meanwhile, Jeanette cleaned the bathroom and later disposed of Richardson's clothes and other evidence.

A few days later, defendant, Jeanette, and Keach met to concoct a story to tell the police in the event they were ever questioned. They decided to say that defendant had met the woman but had dropped her off on the side of the road to hitchhike when his car ran out of gas.

C. Procedural History

The jury found defendant guilty of first degree murder (§ 187, subd. (a).) Defendant admitted that in 1998 he had been convicted of robbery (§ 211), a serious or violent felony (§§ 667, subd. (b), 1170.12, subds. (a-d)). The trial court sentenced defendant to 25 years to life and doubled the sentence under the "Three Strikes" law.

Additional facts are set forth in the discussion of issues to which they pertain.

III. DISCUSSION

A. Denial of Defendant's *Faretta* Motion

Defendant contends the trial court erred in denying his motion to represent himself under *Faretta.*

1. Additional Factual Background

Defendant's trial was originally scheduled for May 22, 2001. On that date, defendant stated: "I would like to ask for a *Faretta* hearing or a motion hearing." Having previously spoken with defense counsel in chambers, however, the trial court declared a doubt as to defendant's competency under section 1368 and declined to entertain defendant's motion. Defendant's counsel represented that since defendant was 16 years old, he had been on social security based on mental disability. He had been taking psychotropic medication for several years, but the jail physicians had recently removed him from the medication, and defendant was on suicide watch. The court declared a doubt as to defendant's competence, suspended the criminal proceedings, and appointed a medical commission to examine defendant. Defendant stated, "I would like

to state to the Court that I have been harassed by the sheriffs, been called homosexual because of my eyelashes being shaved. [¶] He has told me—[.]" The court stated, "I don't care to listen to him." Defendant nonetheless continued, "—that I was a punk ass, faggoty ass slob." The court repeated the date it had announced for the hearing on defendant's competence, and defendant stated, "Just as long as you heard and as long as you know that."

On July 11, 2001, after the psychological evaluations of defendant were conducted, defendant's counsel stipulated to the findings of the medical commission that defendant was competent to stand trial, and criminal proceedings were reinstated.

On October 4, 2002, defendant's counsel again requested a section 1368 evaluation. Counsel represented that defendant had been on suicide watch for two weeks. The trial court suspended the criminal proceedings. On April 21, 2003, the court found defendant to be incompetent on the basis of the psychologists' reports and referred the matter for a placement report. On June 3, 2003, the trial court ordered that defendant be committed to Patton State Hospital. On September 23, 2003, defendant was declared competent. The criminal proceedings were reinstated, and a new trial date was set.

On April 26, 2004, the date that trial was to begin, defendant stated, "What did you guys shut off the air systems for?" He repeated that statement and then continued, "For sexual favors or not? I said for sexual favors or not." After discussion with counsel, the court told defendant to be quiet and stated defendant would be removed from the courtroom if he continued to speak while the court was speaking. Defendant started

chanting, and the court ordered him removed. The court stated, "And the record's going to reflect the reason I'm removing Mr. Carraway from the court is he continues to interrupt the proceedings, is refusing to listen to orders from the bailiff, will not respond to orders from the bailiff regarding keeping silent, plus he refused to sit down when he was told to by the bailiff to do so and because the Court's concerned about the safety of those who are present and his safety as well. . . ." His counsel once again declared a doubt as to defendant's competence to stand trial. The trial court asked whether anyone had suggested defendant was malingering, and the prosecutor stated his belief that defendant was malingering. The trial court suspended criminal proceedings and appointed a new panel to examine defendant.

On August 26, 2004, on the basis of the psychologists' reports, the court found that defendant was incompetent. On October 12, 2004, defendant was again committed to Patton State Hospital.

On the basis of psychologists' reports, defendant was found competent on April 7, 2005, and the criminal proceedings were reinstated. On May 6, 2005, defendant entered a plea of not guilty by reason of insanity.[3]

At a hearing on September 23, 2005, defendant stated, "I was planning to see if I could go pro[.] per[.] because [he and trial counsel] have personal disagreements on what needs to be done and what should be done, you know, so I think—" The trial court interrupted defendant to question him about his educational background, whether he had

[3] Defendant withdrew that plea before trial.

any courtroom experience, why he felt he could do a better job than his attorney, and how he intended to conduct an investigation. Defendant indicated he had taken some junior college classes, including "[a]uto body, sports training, and . . . a number of general education classes like math and stuff," but he had never taken any law or paralegal courses. He had been in court before for "[m]inor cases such as robbery and grand theft," he had read books on trials, evidence and federal rules, and he intended to file a motion to have the court appoint an investigator. When the trial court asked why defendant thought he could represent himself better than counsel, defendant replied, "Well, because I know the truth and the facts of what happened, and I think that I would be better suited to make the decisions or at least better suited to decide what areas need to be investigated further before trial and during trial." He stated: "I've read a number of law books concerning trial and evidence, the federal rules of code [*sic*]. . . . [¶] I believe that I can bring—I believe that only I can bring out judgment from the—that I can bring out what I want to be brought forth into the court of law and consider." Defendant also expressed dissatisfaction with his counsel because his counsel refused to do what defendant asked him to do.

The trial court denied defendant's motion, citing *People v. Manago* (1990) 220 Cal.App.3d 982 (*Manago*). The trial court stated, "[Defendant] has no legal education, has never—thus, has no idea how to conduct himself pursuant to the Rules of Evidence in a trial, and that this would reduce it to a sham or a farce." The trial court also denied

defendant's request to be appointed co-counsel so that he would have access to a legal library.

On October 24, 2005, defendant's counsel again expressed doubt as to defendant's competence, and proceedings were again suspended. After receiving the report from an examining doctor, the trial court reinstated the proceedings on December 12, 2005. At the hearing, defendant repeatedly interrupted his counsel and attempted to address the court. The court told defendant to keep quiet or he would be removed from the courtroom. Defendant exited the courtroom, and the court stated, "He's going to watch the trial from the back because he can't keep his mouth closed."

On June 9, 2006, defendant's counsel yet again raised a doubt as to defendant's competency, and proceedings were again suspended. On September 26, 2006, the trial court reinstated the proceedings on the basis of the conclusions in the psychologist's report. The matter finally proceeded to trial in November 2006.

2. Standard of Review

"In determining on appeal whether the defendant invoked the right to self-representation, we examine the entire record de novo. [Citation.]" (*People v. Dent* (2003) 30 Cal.4th 213, 218.) Moreover, "[e]ven though the trial court denied the request for an improper reason, if the record as a whole establishes defendant's request was nonetheless properly denied on other grounds, we would uphold the trial court's ruling." (*Ibid.*)

3. Analysis

A criminal defendant has a Sixth Amendment right to represent himself at trial (*Faretta*, *supra*, 422 U.S. at p. 807), and "[a] trial court must grant a defendant's request for self-representation if three conditions are met. First, the defendant must be mentally competent, and must make his request knowingly and intelligently, having been apprised of the dangers of self-representation. [Citations.] Second, he must make his request unequivocally. [Citations.] Third, he must make his request within a reasonable time before trial. [Citations.]" (*People v. Welch* (1999) 20 Cal.4th 701, 729 (*Welch*).)

a. Trial court's reliance on *Manago*

Defendant contends the trial court erred in relying on *Manago* as the basis for denying his *Faretta* motion in light of the United States Supreme Court's holding in *Godinez v. Moran* (1993) 509 U.S. 389, 399-400 (*Godinez*), and the California Supreme Court's holding in *Welch*, *supra*, 20 Cal.4th at p. 729. In *Manago*, this court interpreted the requirement of a knowing and intelligent waiver as also requiring that the defendant possess the minimal ability to present at least "'a rudimentary defense.'" (*Manago*, *supra*, 220 Cal.App.3d at p. 988, quoting *People v. Burnett* (1987) 188 Cal.App.3d 1314, 1323, abrogated in *People v. Hightower* (1996) 41 Cal.App.4th 1108, 1113.) Three years after *Manago* was decided, however, the United States Supreme Court stated in *Godinez*, "the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself." (*Godinez*, *supra*, at p. 399, fn. omitted.) The court explained that "the defendant's 'technical legal

knowledge' is 'not relevant' to the determination whether he is competent to waive his right to counsel, (citation), and . . . emphasize[] that although the defendant 'may conduct his own defense ultimately to his own detriment, his choice must be honored,' (citation)." (*Godinez*, *supra*, at p. 400, quoting *Faretta*, *supra*, 422 U.S. at pp. 834, 836.)

Thereafter, the California Supreme Court interpreted *Godinez* as "'explicitly forbid[ding] any attempt to measure a defendant's competency to waive the right to counsel by evaluating his ability to represent himself.' [Citation.]" (*Welch, supra*, 20 Cal.4th at p. 734.) Instead, the court stated, a "knowing and intelligent" waiver requires only that the defendant actually understand the significance and consequences of his decision and that the decision was uncoerced. (*Id.* at p. 733; see also *People v. Dunkle* (2005) 36 Cal.4th 861, 907-909 [finding error in the trial court's denial of the defendant's *Faretta* motion based on the defendant's "education and his language," but finding that the error had been waived in subsequent proceedings], overruled in part on other grounds as stated in *People v. Doolin* (2009) 45 Cal.4th 390, 421.) The People acknowledge that in *Welch,* the court impliedly overruled *Manago,* and the People concede that the trial court therefore erred in basing its denial of the *Faretta* motion on *Manago*.

b. *Indiana v. Edwards*

However, as noted above, we affirm the trial court's denial of a *Faretta* motion if the denial was supported on any basis established by the record, even on grounds the trial court did not expressly articulate. (*People v. Dent, supra,* 30 Cal.4th at p. 218.) The People contend that the United States Supreme Court's recent decision in *Indiana v.*

Edwards (2008) __ U.S. __ [128 S.Ct. 2379, 171 L.Ed.2d 345, 2008 U.S. Lexis 5031] (*Edwards*) supports the trial court's ruling.

While this appeal was pending, the United States Supreme Court issued its decision in *Edwards*.[4] In that case, while the defendant was awaiting trial on charges of attempted murder, battery, criminal recklessness, and theft, his competency was brought into question several times. Twice he was found to be incompetent, and he spent several months in a state hospital. When his condition improved, he was found competent to stand trial. Just before his trial was set to begin, he asked to represent himself and requested a continuance. The trial court denied the motion, and the defendant stood trial while represented by counsel. The jury found him guilty of some charges but could not reach a verdict as to two charges, and the state elected to retry him on those charges. Before his retrial, the defendant again asked to represent himself. Citing the defendant's "lengthy record of psychiatric reports," the trial court denied the request. It found that the defendant was competent to stand trial but was not competent to represent himself. On retrial, the defendant was convicted of the remaining two charges. (*Edwards*, *supra*, 128 S.Ct. at pp. 2382-2383.)

On appeal, the Indiana intermediate appellate court and Indiana Supreme Court found reversible error in the denial of defendant's request to represent himself. The United States Supreme Court disagreed, holding that the constitution does not forbid a

[4] On this court's own motion, we requested the parties to provide additional briefing on the applicability of *Edwards* to the facts of this case.

state from applying different standards for evaluating whether a defendant is competent to stand trial and whether he is competent to represent himself. (*Edwards*, *supra*, 128 S.Ct. at pp. 2387-2388.) Thus, *Edwards* does not require a state to establish a higher threshold for determining competency for self-representation. Rather, *Edwards* established a permissive rule only; in other words, the court in *Edwards* held that separate standards were not unconstitutional. (*Id.* at p. 2388.)

However, the California Supreme Court has established a unitary standard for competence under which competency to waive counsel is the same as competency to stand trial. In *Welch*, the court stated, "As the United States Supreme Court has made clear, the two standards of competence are the same. [Citation.]" (*Welch*, *supra*, 20 Cal.4th at p. 732 [holding the trial court "erred in its determination that a higher standard of competence to waive counsel applied"]; see also *People v. Halvorsen* (2007) 42 Cal.4th 379, 433 ["The stated basis for the trial court's denial of defendant's motion for self-representation—his supposed mental incapacity not amounting to incompetency to stand trial—therefore was invalid."].)

Even if the California Supreme Court's holding in *Welch* was based on a misreading of *Godinez*, as *Edwards* suggests, the California Supreme Court has not yet announced a different threshold for competency to waive counsel, as invited by the United States Supreme Court in *Edwards*. *Edwards* is not expressly contrary to *Welch* because *Edwards* merely establishes that a state *may* establish two standards of competence, not that a state *must* do so. Thus, the California Supreme Court's holding on

the issue still stands. "Our duty as an intermediate appellate court is to follow the decisional law laid down by the State Supreme Court." (*Beckman v. Mayhew* (1975) 49 Cal.App.3d 529, 535.) We are bound by the California Supreme Court's interpretation of federal questions in the absence of contrary decisions of the United States Supreme Court. (*People v. Landry* (1996) 49 Cal.App.4th 785, 791.)

c. Defendant's disruptive courtroom behavior

Even if *Edwards* does not provide a basis for affirming the trial court's ruling, our de novo review of the record shows another basis for doing so.[5] A criminal defendant's right to represent himself is not a license to abuse the dignity of the courtroom or disrupt the proceedings. (*People v. Marshall* (1997) 15 Cal.4th 1, 20.) In *Welch*, *supra*, 20 Cal.4th 701, the court held that the trial court did not abuse its discretion in denying the defendant's request for self-representation because the defendant had exhibited disruptive

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[5] The People also argue that "by juggling his motion for *Faretta* with his right to counsel by way of his *Marsden* motions [*People v. Marsden* (1970) 2 Cal.3d 118], the trial court could have reasonably concluded that [defendant] was playing "the *Faretta* game," that is, he was playing games with the court in an effort to delay the trial. Defendant was represented by numerous different appointed and retained counsel before his mother apparently retained Haynal for him. However, the record does not show that any substitution of counsel was made under *Marsden*. Thus, the People's argument based on *Marsden* is unsupported by the facts.

In addition, the People argue that the trial court appeared to base its ruling on evidence that the motion was made for the purpose of delaying the trial. The record does not support that contention. Immediately before to defendant's *Faretta* request, the trial court had indicated a tentative trial date of November 21, 2005, and asked defendant if he would accept a 60-day time waiver of his speedy trial rights. Defendant did not request any further continuance, and the trial court did not inquire whether he would be able to proceed to trial on the tentatively scheduled trial date. Thus, the record does not support the argument that the trial court believed the *Faretta* motion was made for purposes of delay.

behavior in the courtroom on several occasions. The court explained, "*Faretta* itself warned that a trial court 'may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct.' [Citation.] We assume the same rule applies to the denial of a motion for self-representation in the first instance when a defendant's conduct prior to the *Faretta* motion gives the trial court a reasonable basis for believing that his self-representation will create disruption. 'The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.' [Citation.] The high court reiterated this point in *McKaskle* [*v. Wiggins* (1984)] 465 U.S. 168, noting 'an accused has a Sixth Amendment right to conduct his own defense, provided only that he knowingly and intelligently forgoes his right to counsel *and that he is able and willing to abide by rules of procedure and courtroom protocol*.' [Citation.] This rule is obviously critical to the viable functioning of the courtroom. A constantly disruptive defendant who represents himself, and who therefore cannot be removed from the trial proceedings as a sanction against disruption, would have the capacity to bring his trial to a standstill. [¶] Thus, a trial court must undertake the task of deciding whether a defendant is and will remain so disruptive, obstreperous, disobedient, disrespectful or obstructionist in his or her actions or words as to preclude the exercise of the right to self-representation. The trial court possesses much discretion when it comes to terminating a defendant's right to self-representation and the exercise of that discretion 'will not be disturbed in the absence of a strong showing of clear abuse.' [Citations.] We see no

reason not to use the same deference when it comes to deciding whether a defendant's motion for self-representation should be granted in the first instance." (*Id.* at pp. 734-735.)

Here, defendant had engaged in disruptive behavior in the courtroom on at least two prior occasions, requiring the court to admonish him, and once, to remove him from the courtroom.[6] Defendant's repeated disruptive behavior provides an independent basis for upholding the trial court's denial of defendant's motion for self-representation. (*Welch, supra*, 20 Cal.4th at p. 735.)

We conclude the trial court did not err in denying defendant's *Faretta* motion.

B. Confidential Marital Communications Privilege

Defendant contends the trial court erred in admitting into evidence defendant's statements to Jeanette because those statements were privileged confidential marital communications.

1. Additional Factual Background

At a pretrial Evidence Code section 402 hearing, defense counsel sought to exclude, under the confidential marital communication privilege (Evid. Code, § 980), statements defendant made to Jeanette regarding the murder. During the hearing, Jeanette testified that on October 25, she had heard defendant and Keach talking outside,

[6] And, although not a basis for the trial court's denial of the *Faretta* motion, defendant again engaged in disruptive behavior on December 12, 2005.

and she had stood on the bathtub to better hear their conversation. She heard defendant tell Keach that defendant "killed her" and "[s]he's dead."

After Keach left, Jeanette asked defendant how defendant had received scratch marks on his face. Defendant told her he had picked up a man so they could get high together and then had scuffled with the man. Jeanette told defendant she did not believe him. Defendant later confessed to her that he had brought a woman home, and they had gotten high together and had had sex. He told Jeanette that when the woman began speaking about religion, he had "snapped" and had choked the woman to death. He had removed the woman's clothes and put her body in the bathtub filled with water and then snapped her neck to make sure she was dead. He had cut off her head using a kitchen knife and wire cutters. He also told her he had thrown the head into the California aqueduct.

Jeanette testified she had thrown out a bathroom rug that had brownish stains because defendant had said the stains were the woman's blood. She had thrown away the shoes defendant had worn when he dumped the woman's body in the desert because defendant told her "he had to get rid of the shoes." Finally, she had purchased stain remover and had cleaned a bloodstain in the back seat of the car after defendant told her he had tried and had been unable to do so.

Jeanette testified she had called her brother and had told him what defendant had revealed about killing the woman. She told her brother about her tattoos and scars so her family could identify her body if defendant did the same thing to her. On October 30,

Jackson called Jeanette because Richardson's family had been calling Jackson to ask about Richardson. Jeanette then told Jackson what defendant had told Jeanette about the killing.

Keach testified that defendant told him defendant had picked up a woman in San Bernardino to have sex, had brought her to his Pinon Hills home, and had gotten into an argument with her when she wanted to leave. Keach had previously told a detective that defendant said he had dropped the woman off near the freeway. Keach denied, however, that defendant said he had killed anyone, or that defendant knew she was dead.[7]

The trial court found that defendant's statements to Keach were not privileged because they were made to a party outside the marriage. Defendant concedes the admission of these statements was proper. The trial court held that defendant's statements to Jeanette regarding the murder and the disposal of the body were admissible under Evidence Code section 912 because defendant had disclosed a significant portion of the privileged communications to Keach. Finally, the court found the statements regarding disposal of evidence admissible under Evidence Code section 981 because they made Jeanette an accessory to the murder (§ 32).

2. Standard of Review

We review the trial court's ruling on the admissibility of evidence when the marital communications privilege has been asserted under an abuse of discretion

[7] The court determined that any questions regarding the credibility of the witnesses were an issue for the jury to determine, and discrepancies in Jeanette's and Keach's versions of the events did not affect the admissibility of the evidence.

standard. (*People v. Mickey* (1991) 54 Cal.3d 612, 654.) "The underlying determinations, of course, are scrutinized in accordance with their character as purely legal, purely factual, or mixed." (*Ibid.*)

3. Analysis

Evidence Code section 980 provides that "a spouse . . . has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if . . . the communication was made in confidence between him and the other spouse while they were husband and wife." (Evid. Code, § 980.) "Because privileges 'prevent the admission of relevant and otherwise admissible evidence,' they 'should be narrowly construed.' [Citation.] Applying this maxim in the marital privileges context, our courts have broadly construed the exceptions to these privileges. [Citations.]" (*People v. Sinohui* (2002) 28 Cal.4th 205, 212; see also *Dunn v. Superior Court* (1993) 21 Cal.App.4th 721, 725 [adhering to "the courts' policy to construe privileges narrowly" by applying marital communications privilege exceptions broadly].)

The prosecution argued that the privilege had been waived because (a) defendant had disclosed a significant portion of the communication to Keach (Evid. Code, § 912),[8]

[8] Evidence Code section 912, subdivision (a) provides, in relevant part: "Except as otherwise provided in this section, the right of any person to claim a privilege. . . is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone."

and (b) the communication was made to enable or aid Jeanette in the commission of a crime (Evid. Code, § 981),[9] the destruction of evidence (Pen. Code § 135). Defendant contends that because the statements to Keach occurred before the statements to Jeanette, his statements to Keach could not have waived a privilege that did not yet exist. To support his argument, defendant cites *Lohman v. Superior Court* (1978) 81 Cal.App.3d 90 (*Lohman*), which addressed the issue of waiver in the context of the attorney-client privilege. In *Lohman*, the petitioner, who had previously been placed under a temporary conservatorship, had sued the temporary conservator and the attorneys who represented him. In that action, the petitioner subpoenaed records from several of her former attorneys regarding their representation in the action against the conservator. The defendant argued that the privilege protected the content of a communication between attorney and client, and once a significant part of that content had been voluntarily disclosed, that content could no longer be protected against disclosure. The court disagreed, holding instead that "it is *not* the content of the communication but the relationship that must be preserved and enhanced" by the existence of a privilege. (*Id.* at p. 97.) The court reasoned, "[I]f the client discloses certain facts to a third person and subsequently advises his attorney of those same facts in the form of a confidential communication, there has been no waiver since, obviously, the client had not disclosed to

[9] Evidence Code section 981 provides: "There is no privilege under this article if the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or a fraud."

the third person the confidential communication to the attorney, i.e., *had not disclosed that certain information had been communicated to the attorney*." (*Ibid*.)

Applying this analysis, defendant argues the marital privilege has not been waived because defendant did not disclose to Keach information that had already been communicated to Jeanette. We conclude, however, that *Lohman* is neither controlling nor persuasive.

Since *Lohman* was decided, our courts have shown a clear preference for narrowly construing privileges while broadly construing exceptions to privileges, because privileges prevent the admission of otherwise admissible evidence. (See *People v. Sinohui, supra,* 28 Cal.4th at p. 212; see also *Dunn v. Superior Court, supra,* 21 Cal.App.4th at pp. 725-726.) Thus, the California Supreme Court has narrowly interpreted Evidence Code section 980 to mean that a communication does not become privileged simply because it is made within a statutorily protected relationship; rather, the communication must be made in confidence. "'To make a communication "in confidence," one must *intend nondisclosure* . . . .' [Citation.] 'While a communication between a husband and wife is presumed to be confidential, if the facts show that the communication was not intended to be kept in confidence, the communication is not privileged.' [Citations.]" (*People v. Cleveland* (2004) 32 Cal.4th 704, 744; italics added.) Hence, it is the intent not to disclose which makes a communication privileged. In *People v. Cleveland,* the court held that the defendant's statement to his wife that before the murders he had been at the motel where the murders took place and had met

one of the murder victims there, was not confidential. (*Id.* at p. 743.) The court concluded that because the defendant had told others in his wife's presence that he had previously dealt with one of the murder victims at that motel, and because he had also told a detective he had been at the motel, the facts showed the defendant did not intend to keep the communication confidential. (*Id*. at p. 744.) Likewise, in *People v. Gomez* (1982) 134 Cal.App.3d 874, the court held that the defendant's statements to his wife in which he made threats against the murder victim were not intended to be kept in confidence because the defendant had repeated the same threats in the presence of three other people. (*Id.* at p. 879.)

Here, Jeanette testified she had heard defendant tell Keach that he had killed someone. Defendant told Keach he had brought a woman home from San Bernardino, had sex with her, and had gotten into an argument with her when she wanted to leave. The additional details defendant disclosed to Jeanette regarding the reason for the argument, the manner in which defendant performed the decapitation, and the location of the body, were of nominal value in comparison to the significant revelation that defendant had killed Richardson. Thus, defendant's disclosure of the killing to Keach undermined any claim of that defendant intended the communication to Jeanette to be kept in confidence. (*People v. Gomez*, *supra*, 134 Cal.App.3d at p. 874.) We conclude the trial court did not abuse its discretion in admitting Jeanette's testimony regarding defendant's statements about the killing and the disposal of Richardson's body.

Defendant next contends the record developed during the Evidence Code section 402 hearing failed to establish that his statements regarding the disposal of evidence furthered the commission of a crime or fraud, and the trial court erred in so finding. We disagree.

As defendant points out, the Law Revision Commission Comments of Evidence Code section 981 stress the limited nature of the exception provided by section 981. That section "'does not permit disclosure of communications that merely reveal a plan to commit a crime or fraud; it permits disclosure only of communications made to *enable* or *aid* anyone to commit or plan to commit a crime or fraud. Thus, unless the communication is for the purpose of obtaining assistance in the commission of the crime or fraud or in furtherance thereof, it is not made admissible by the exception provided in this section.'" (*People v. Clark* (1990) 50 Cal.3d 583, 622.)

Defendant cites *People v. Dorsey* (1975) 46 Cal.App.3d 706 (*Dorsey*) to support his contention that his statements merely revealed the details of his crime and were not intended to enable or aid Jeanette to commit or plan to commit a crime of her own. In *Dorsey*, the defendant was charged with burglary, arson, causing an explosion with intent to destroy a building, and forgery. The defendant's wife testified that he had told her in advance about various aspects of the crimes he intended to commit, had taken her to several of the locations before committing the crimes, and later had taken her to see the results of his crimes. The defendant did not suggest or intimate that his wife should participate in the crimes, and she did not actually engage in any unlawful conduct. (*Id*. at

pp. 709-712.) The court expressly found that there was "nothing in the statements by [the defendant] as testified to by [his wife] which would indicate that the statements were made in whole or in part to enable or aid [defendant] to commit or plan to commit a crime." (*Id*. at p. 718.) The court found the statements were therefore protected by marital privilege and did not fall within the crime or fraud exception. (*Ibid*.)

Unlike in *Dorsey*, sufficient evidence here indicates defendant's statements were intended to enable or aid Jeanette to commit a crime. First, unlike the defendant's wife in *Dorsey*, Jeanette did, in fact, engage in the unlawful destruction and concealment of evidence after these statements were made. Although Jeanette testified that defendant never asked her to do so, she had disposed of the bathroom rug because defendant told her the blood on the rug was Richardson's. Jeanette further testified she had thrown away defendant's shoes because he had told her "we need[] to get rid of those shoes." She testified that she had purchased stain remover and had scrubbed the back seat of the car after defendant told her Richardson's severed head had left a bloodstain there and that his previous attempts to clean it had been unsuccessful.

In *People v. Santos* (1972) 26 Cal.App.3d 397 (*Santos*), the defendant had been arrested for murder. During a jailhouse visit, he had told his wife to "get rid" of the murder weapon. (*Id*. at p. 400.) While simultaneously holding the statements were not made in confidence because the couple knew their conversation was being recorded, the court reaffirmed that the "the privilege does not cover communications made to enable the other to commit a crime (Evid. Code, § 981), destruction or concealment of evidence

being a crime. (Pen. Code, § 135.)" (*Id.* at pp. 402-403.) Similarly, in *People v. Von Villas* (1992) 11 Cal.App.4th 175, the court held the crime/fraud exception to the marital communications privilege applied to the defendant's statements to his wife telling her to destroy personal letters he had sent her and stating he would himself get rid of another piece of evidence. (*Id.* at p. 222-223.) The court determined that the conversation had been made, at least in part, to enable the commission of the crime of obstruction of justice and removal of evidence. (*Ibid.*)

Defendant argues that, unlike the defendant in *Santos*, he never specifically asked Jeanette to participate in concealing or disposing of the evidence, but neither *Santos* nor Evidence Code section 981 requires a defendant to make an unequivocal request that his spouse commit a crime for the exception to apply. Rather, the statement must be "made, in whole or in part, to enable or aid" a plan to commit a crime. (Evid. Code, § 981; *Santos, supra,* 26 Cal.App.3d at pp. 402-403.) Thus, simply because defendant did not say the magic words, i.e., "Get rid of this evidence," does not preclude the reasonable inference that his statements were, in fact, intended to aid Jeanette in so doing. This inference is further supported by uncontroverted evidence that defendant actually drove Jeanette to the various locations where the shoes and rug were dumped, and that he was in the car while she was cleaning the bloodstain on the back seat.

We conclude the trial court did not abuse its discretion in admitting Jeanette's testimony about defendant's statements regarding the incriminating evidence.

C. Admission of Defendant's Statements to Police

Defendant contends the trial court erred in not finding that his statement concerning the location of Richardson's body was involuntary and inadmissible. He argues detectives made it clear that in exchange for a cigarette, they expected information about the location of the body. Defendant asserts the confession is inadmissible under the federal constitution, and the admission of the confession cannot be considered harmless error.

1. Additional Factual Background

At the Evidence Code section 402 hearing, Sergeant Carlos Espinoza testified that he and Detective Kenneth Wolf had interviewed defendant at the sheriff's department at about 4:45 p.m. on October 30, 1999. Defendant was not under arrest, but he was given *Miranda*[10] advisements before the interview began, and he agreed to talk to the officers. The first interview lasted approximately one hour. The officers then took a break to interview Jeanette.

Beginning at 8:00 or 8:30 p.m., the officers again interviewed defendant until about 9:30 p.m. Sergeant Espinoza did not remember if defendant had been given anything to eat or drink, but the sergeant testified it was the "common practice" to offer interviewees food or drink, "especially if it was over a period of time."

Sergeant Brad Toms testified he had interviewed defendant starting about 9:50 p.m. on October 30. The interview lasted about two hours without any breaks. Around

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[10] From *Miranda v. Arizona* (1966) 384 U.S.436.

1:00 a.m. on October 31, defendant requested a cigarette break. Sergeant Toms replied, in effect, "[Defendant] hadn't told us where the body was, why should I give him a cigarette . . . ." Nevertheless, Sergeant Toms took defendant outside to smoke. Defendant and Sergeant Toms chatted while defendant smoked, and after defendant finished his cigarette, Sergeant Toms asked him again where the body was. Sergeant Toms showed defendant a map based on the map Jeanette had drawn in her interview and asked defendant to identify where Richardson's body could be found. Defendant took a deep breath, grabbed the map, and drew a line and an "X" on the map. He said, "That's where you'll find the body but I didn't kill her."

During in limine motions, defense counsel moved to exclude defendant's statements on the grounds they had been involuntarily obtained because of the coercive atmosphere. The statements were made when it was late, defendant had been interviewed for 10[11] or more hours, defendant had not had the opportunity to sleep, and detectives coerced the statement by withholding cigarettes. The trial court denied the motion because there was no evidence to suggest defendant had indicated he was tired or that he

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[11] At the hearing, defense counsel indicated defendant had been interviewed for about 10 hours before Sergeant Toms joined the interview. Defense counsel later argued defendant had been interviewed for "almost 14 hours" before he revealed the location of the body. Sergeant Toms testified that he did not know how long the prior interview had lasted, but it had been "lengthy." Sergeant Toms testified he had interviewed defendant from about 9:50 p.m. on October 30 until "close to" 1:00 a.m. on October 31 before defendant made his statement. Sergeant Espinoza's undisputed testimony established that defendant had been interviewed for about two and one-half hours before Sergeant Toms joined the interview team. Thus, the record indicates defendant was actually interviewed for, at most, five and one-half hours before he made his statement.

had requested to end the interview. Furthermore, no evidence suggested defendant suffered from any physical, mental, or emotional impairment when he made his statement.

2. Forfeiture

The People argue that defendant has forfeited the argument that the withholding of cigarettes constituted coercion because defendant withdrew the issue from his pretrial suppression motion. Our reading of the record does not support the People's contention. At the hearing on the motion, the prosecutor questioned Sergeant Toms as to the circumstances concerning the cigarette break, and defense counsel cross-examined him on the same subject. Defense counsel argued that the "total scenario [was] one of coercion," and "this was one way to try to get something out of him. I'll give you a cigarette and then you, you know, tell us where the body is." The court stated that it thought the "stronger argument is the length of time. I mean, you did hit on that." Defense counsel responded, "Yeah. It was 1:00 o'clock in the morning. He had been interviewed for almost 14 hours." We do not interpret defense counsel's agreement that one argument was stronger than another to be a forfeiture of the issue of coercion based on the withholding of cigarettes. We will therefore consider the issue on the merits.

3. Analysis

A criminal defendant's involuntary statement obtained by a law enforcement officer through coercion is inadmissible. (*People v. Neal* (2003) 31 Cal.4th 63, 79.) An involuntary or coerced statement is a statement "obtained by physical or psychological

coercion, by promises of leniency or benefit, or when the 'totality of circumstances' indicates the confession was not the product of the defendant's 'free and rational choice.' [Citations.]" (*People v. Cahill* (1993) 5 Cal.4th 478, 482, fn. 1.) A promise of a benefit renders a confession involuntary only if it is the "motivating cause" of the defendant's statement. (*People v. Williams* (1997) 16 Cal.4th 635, 661.)

Contrary to defendant's argument, Sergeant Toms's statement to defendant that "you haven't told us where the body is, why should we give you a cigarette," does not establish coercion. Sergeant Toms, in fact, gave defendant the cigarette before defendant told him the location of the body. The record shows that defendant had been given several breaks throughout the evening; he had been offered coffee, food, and a bathroom break, and he had by given a cigarette at least once earlier in the evening. Moreover, the record does not show that defendant ever told the officers he was tired or needed to rest. We conclude that the record does not establish coercion.

Moreover, defendant's testimony at trial belies his claim on appeal. When the prosecutor asked defendant why he had disclosed the location of Richardson's body, defendant responded, "I felt really—they really touched me when they was talking about the family and whatnot so I figured, you know, hey, let's go ahead and take care of that." By his own admission, therefore, defendant's confession was not based upon the deprivation of cigarettes, but upon the purpose of ending the family's suffering.

Accordingly, we find no error.

VI. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
J.

We concur:

RAMIREZ
P.J.

MCKINSTER
J.